

No. 10430

In the United States
Circuit Court of Appeals
for the Ninth Circuit ³

WONG CHIN PUNG, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Brief of Appellee

Upon Appeal from the District Court of the United States
for the District of Oregon

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JURISDICTION

1. The indictment being under Section 2553, Title 26 U.S.C.A. and Section 174, Title 21 U.S.C.A. (Record 2, 3, 4) the United States District Court for the District of Oregon had original jurisdiction under Sec. 41, Title 28 U.S.C.A. (sub 2) as the indictment charged a crime cognizable under the authority of the United States.

2. (a) This Court has appellate jurisdiction over the District Court of Oregon under Section 211, Title 28 U.S.C.A. placing the District of Oregon in the Ninth Circuit.

(b) This Court has appellate jurisdiction over the District Court in a criminal action by reason of Section 225, Title 28, U.S.C.A. which gives this Court such appellate jurisdiction to review by appeal, final decisions in the District Court, except where direct review may be had in the Supreme Court.

STATEMENT OF FACTS

About midnight of January 12, 1943, Federal Narcotic Agents accompanied one Harry Lee who had previously been arrested for violation of the narcotic laws and who volunteered to assist the officers in making a raid on a room behind barred doors where narcotics were allegedly sold, arrived at a room, No. 10 on the third floor of a building located in a portion of town frequented by Chinese. Some of the agents were stationed on the stairway leading down. One of the agents was located at the door of a room just under the room in question and one of the agents, Henry L. Giordano, remained in the hallway just opposite the outer doorway of room No. 10. All of the doors required unlocking in order to open.

The said Harry Lee had been furnished with \$50.00 of marked money for the purpose of making a purchase of narcotics, if possible. Harry Lee was then admitted to the room by signaling to those inside through means of a coin placed between two nails which made the contact

necessary to the operation of a buzzer located inside. At that time the agent observed a very strong odor of smoking opium in the hallway.

A few minutes later one James Wong came out of the room and the Agent, Giordano, observed two doors both of which were momentarily opened and a person in the room lying on a flat table with smoking equipment alongside of him, that is, a pipe and a lamp. Also he observed a strong odor of smoking opium coming out of the doorway. James Wong, a Chinese, was apprehended and led down the stairs. A few minutes more elapsed and the doors again opened to the room and the same person lying on the bunk with smoking equipment was observed together with a strong odor of smoking opium. At this time Harry Lee came out and almost immediately thereafter the door again opened and one Wong Suey came out. Wong Suey was apprehended and led over to the stairway. The agent then took Harry Lee to the doorway and made the contact for the buzzer system with a coin that he placed between the two nails. Whereupon he heard a sound in the room as he touched the contact and the first door opened. Harry Lee stepped in between the first and second doors with the agent following, crouching down behind him. A conversation in Chinese between Harry Lee and somebody on the other side of the door ensued and shortly the second door was opened. This

door is large and heavy and had in the center of it a round hole about one inch in diameter. Harry Lee stepped into the room and the agent stepped in close behind him.

There were three persons other than the agent and Harry Lee in the room. They were Nee Toy, Louie Jung, alias Gar Foo, and the appellant Wong Chin Pung. As the agent entered, the Chinese known as Louie Jung was just stepping out from behind a desk which was on the left far side of the room in the corner. Nee Toy was standing by one of the bunks which was situated on the left side of the room against the wall and the appellant Wong Chin Pung was standing by the door that the agent had just entered. They were taken into custody.

The agent then pulled a cord that was situated at the side of the inner door allowing the outer door to open and other agents then entered.

A very substantial quantity of smoking opium was found in the desk behind which Louie Jung was standing and at a later time a very substantial quantity of opium was found in the wood pile in the room. Yen shee, or the residue of opium after it is smoked, was found in all of the pipes which were located on the various bunks of the room. The marked money was found in the drawer of the table behind which Louie Jung was standing.

There were three bunks in the room, one directly in

front of the agent as he entered the room up against the wall on the far side, about three feet high. Upon this bunk there were a mat and smoking opium equipment consisting of a lamp and pipe, of a tray, pipe bowl, yen shee, yen gow, tweezers and other equipment used for smoking. There was an identical bunk on the left side of the room as the agent entered, similarly equipped and on the right side of the room against the wall there was a third bunk of the same type and similarly equipped. In the far left-hand side of the room there was a desk or table. In addition there was a red-hot stove on the opposite side and to the right of the agent as he entered. There was no other equipment in the room. The appellant, Wong Chin Pung's coat hung on the wall behind the desk. There was a trap door that was closed and no other persons had been in the room other than those mentioned.

The bunk by which Nee Toy was standing could not be seen from the hall. The pipe on the bunk directly in front of the door as the agent entered was hot and the one to the left-hand side where Nee Toy was standing was hot and the one on the bunk at the right-hand side of the room was tepid or lukewarm. The appellant, Wong Chin Pung, had been sitting on a bed in the room prior to the entrance of the agent.

ARGUMENT

The appellee agrees with the law cited by appellant that the function of this honorable court is not for the purpose of weighing conflicting testimony but only to determine whether there was some evidence competent and substantial, fairly tending to sustain the verdict.

The appellee finds no fault with the definitions offered by appellant of the word "concealment."

What does the phrase "assisting in concealment" mean? In this connection it seems pertinent to point out the provisions of the law under which the indictment is drawn, Section 174, Title 21, U.S.C.A., which reads as follows:

"If any person fraudulently or knowingly imports or brings into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

It is noted that the statute contemplates penalizing of any person who in any manner facilitates the concealment of the narcotic drugs defined in that section.

In the case of *Pon Wing Quong vs. The United States*, 111 F. (2d) 751 (Ninth Circuit, 1940) Judge Stevens says: "Anything done to make the trip less difficult would constitute facilitation of its transportation. Since the term 'facilitate' seems not to have any special legal meaning the framers of this statute must have had in mind the common and ordinary definition as expressed in a standard dictionary. Quoting from Webster's Abridged Dictionary 'facilitate' is defined as follows: To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task."

This case and the statute are helpful in determining Congressional intent as to the degree of assistance necessary for conviction.

Webster's New International Dictionary (2d ed.) defines "assist": to stand by or near; to attend; to accompany; to join; to give support to in some undertaking or effort; to lend aid; to help; to be present as a spectator or to assist at a public meeting.

WHAT DOES THE EVIDENCE SHOW

I. Appellant was smoking opium.

Testimony of Agent, Henry L. Giordano:

R-32

A. * * * As the door was opened I could see into the room. There were two doors, and both of them were momentarily opened and I could see a—there was a person lying on a flat table in the room with smoking equipment alongside of him—that is, the pipe and the lamp.

Q. You couldn't identify who that was?

A. No, sir.

Q. Go ahead.

A. At the same time a strong odor of smoking opium came out of the doorway, and as James Wong came out I took him by the arm and led him over to the stairway, where Agent Doolittle was waiting, and turned him over to Agent Doolittle, who led him down the stairs. I again returned to my position opposite the door, and a few minutes more elapsed and the door again opened to room 10 and I could again see in the room and saw the same person—that is, saw the form of a person lying on the bunk with the smoking equipment, and the smoking opium odor was very strong again as the door opened. * * *

R-35

A. The second door opened and Harry Lee stepped into the room and I stepped in right behind

him. As I entered the room I observed three Chinese in the room.

Q. Now, who did they later—

A. (Interrupting) They were later identified as Nee Toy, Louis Jung alias Gar Foo, and Wong * * * And also Wong Chin Pung alias Wong Ben, who is present.

R-36

Mr. Hedlund: Now, what were their positions there in the room when you first walked in?

A. As I walked in *Louis Jung was just stepping out from behind a desk that was on the left far side of the room in the corner.*

Q. All right; and where were the other two?

A. *Nee Toy was standing by one of the bunks or tables that was situated on the left side of the room against the wall, and Wong Chin Pung was standing near the door.*

Q. Near the door that you just entered?

A. Yes, sir.

R-38

A. I didn't examine them for a little while, until a little while after, but there was yen shee residue in all the pipes.

R-47, 48

Mr. Hedlund: Q. Well, tell us a little more about the description of that room. How many chairs or tables were there?

A. There were three tables that were—

The Court: (Interrupting) Go Ahead.

A. There were three tables, one directly as you came in the room, right against the wall, about three feet high, and it had a mat on it, and there was also the smoking opium equipment, the lamp and the pipe, on that table; and there was an identical table on the left side of the room as you came in that also contained the smoking opium equipment; and on the right side of the room, against the wall, there was a third table that contained the lamps and pipes, and so forth.

R-56, 57

The Court: Well, so far as you know, there were just these five defendants in the room?

A. Yes, sir.

The Court: With the exception of possibly this one man that you saw lying on the table?

A. Yes, sir.

Q. Was there a possibility of getting out through some other door?

A. There was a trap door that was closed, but he couldn't have gotten out because it went down to

another room, 2, and there were other agents covering that.

The Court: Then that eliminates the possibility that you saw six men?

A. Yes, sir, your Honor.

The Court: Was that one that you saw on the table smoking?

A. Yes, sir. * * *

The Court: Were there any other doors to this room 10?

A. No, your Honor. It was completely paneled with plywood all the way around, and the window was boarded up with plywood.

The Court: Was there any top door up, or was that the top story?

A. That was the top story, your Honor.

R-70, 71

Q. Then when you looked in that room you couldn't see whether they were smoking opium or not, could you?

A. Well, I could see all the smoking opium equipment in there and the pipe.

The Court: Didn't you say a while ago that you saw one man smoking, lying on the table?

A. That is correct. * * *

Q. You could see him using the pipe?

A. I could see him using the pipe.

R-78

Q. Nee Toy.

A. Yes, sir.

Q. Where was he when you went in the room?

A. He was standing by the bunk on the left-hand side of the room.

R-84

Q. And when you first went into the room Nee Toy was standing by that first left-hand bunk?

A. Yes, sir.

Q. Could you see that from out in the hall?

A. No, sir.

Testimony of Anker M. Bangs:

R-116

Q. Now, when you went up to the room did you examine the smoking-opium pipes about which there has been testimony here?

A. That is the first thing I did when I entered the smoking room proper.

Q. Well, how long was it,—would you have any way of knowing how long it was after Giordano first went into the place that you got in?

A. It was less than ten minutes.

Q. Would you say it was more than eight?

A. No, it was probably even less than that, probably about five or six minutes.

Q. Well, what did you find with reference to the pipes?

A. I found all three lamps red hot, that is, good and hot, and two of the pipe stems and the bowls hot.

R-122

Mr. Hedlund: Q. The hot pipes, Mr. Bangs, you say there was one that was tepid and two that were warm?

A. Yes.

Q. Can you locate those?

A. No, I can't pick out the two that were real hot.

Q. No, I don't mean the pipes themselves, but the place where you found them.

A. *The one directly in front of the door as you came in was hot, and the one to the left-hand side was hot, and the one to the right-hand side was the tepid or lukewarm one.*

Q. And that was on the opposite side of the room from the desk?

A. That is right.

Testimony of Louis Jung, alias Gar Foo:

R-189

Mr. Collier: Wong Chin Pung, stand. Do you know this man here?

A. I know him.

Q. Did you see him on the night, the morning of the arrest, January 13th last?

A. At the time he was arrested he was talking about some news concerning the Japanese war.

Q. And where was he when he was talking?

A. He was inside, sitting on a bed, talking.

From this testimony it can be readily seen that there is substantial evidence from which it can be concluded that the appellant Wong Chin Pung was, at the time Agent Giordano stood outside of the door to room 10 and during the time the doors were opened for the purpose of allowing persons to enter and leave, lying on the bunk opposite the doorway and smoking opium.

The agent has shown that there was a man lying on the bunk opposite the doorway who was smoking opium and when he entered the room there were only three persons in the room. No one could have escaped. The defendant Louis Jung was behind the table at the far left-hand side of the room from the entrance, the defendant Nee Toy was beside a bunk at the near left-hand side of

the room as he entered and the appellant Wong Chin Pung was by the door through which the agent entered.

The man who had been lying on the bunk directly in front of the door was no longer there. The logical conclusion is that the man who had been lying on the bunk smoking was the appellant Wong Chin Pung.

- II. The appellant operated and controlled the opening and closing of both the outer and inner doors which were used for the purpose of concealing smoking opium.

Testimony of Henry L. Giordano:

R-33, 34

A. I then took Harry Lee back to the door from the stairway where I had turned Wong Suey over to Agent Doolittle and I stood him right directly in front of the door of room 10. I took a coin that I placed at the contact on the right side of the door, two nails.

Q. In other words, contact between two nails that were set parallel with each other?

A. Yes, sir.

Q. Or alongside of each other, that made a contact?

A. Yes, sir.

Q. Go ahead.

A. I could hear a sound in the room as I touched that contact and the first door opened and Harry Lee stepped in and I stepped in behind him and crouched down behind him between the first and second doors. *There was some Chinese conversation between Harry Lee and somebody on the other side of the door, that is, the second door, and in just a short period of time the second door was opened.*

Q. Now, just one moment. That second door, can you describe it?

A. Yes, sir.

Q. Did it have a window in it?

A. It had a round hole in the door about an inch in diameter, or maybe a little bit larger than that.

R-36, 37

A. Nee Toy was standing by one of the bunks or tables that was situated on the left side of the room against the wall, and *Wong Chin Pung was standing near the door.*

Q. Near the door that you just entered?

A. Yes, sir. * * *

A. * * * The first door had closed behind me as I came in, so I had to pull a cord that was situated as you—as you left the door it was on the left side of the door; it was a cord like a pulley, and I pulled that cord and I allowed—it opened the door and Agents Doolittle and Richmond entered the opium den.

R-50

A. There was a coat hanging on the wall, and which Wong Chin Pung was allowed to put on. It matched his pants that he had on at that time.

Mr. Hedlund: Q. And that coat was where?

A. Hanging on the wall behind the desk.

R-74, 75

Mr. Hannon: Q. Now, then, you accompanied Lee back into the room, did you?

A. Yes, sir.

Q. How did you get in?

A. Through the door.

Q. Did Lee again put the coin in the—

A. I placed the coin at the door.

Q. You placed it?

A. Yes.

Q. Were you out in front of Lee at that time?

A. No, sir.

Q. Oh, was Lee ahead of you?

A. Lee was right by the door, right in front of the door, and I was standing right next to him where the contact was.

Q. You had to be in front of the door in order to put in the coin to unlock the door?

A. Well, the coin was on the right side of the door, on the paneling, and I stood over there and put the coin, and Harry Lee was standing right in front of the door.

Q. And then did the door instantly open?

A. Just within less than a minute.

Q. And when the door opened where were you situated? Where were you standing at the time that door opened?

A. I was standing right a little bit behind Harry Lee, and to his right.

Q. Why were you behind him?

A. Well, he was directly in front of the door.

Q. Well, what was your purpose in getting behind him?

A. To gain entrance.

Q. Well, you had entrance the minute that door opened, didn't you?

A. Oh, no.

Q. What did you have to do after you got through that door?

A. Had to go through another door.

Q. Did that door require any unlocking?

A. All the doors required unlocking.

Q. The doors weren't open?

A. No, sir.

Q. How did you open the second door?

A. The second door was opened by somebody inside.

Q. Did Harry Lee call out, or anything of that kind? How did they know that Lee was there?

A. Well, somebody looked at him through the peek-hole, I believe. I don't know.

Q. And you were still standing behind Harry Lee?

A. Yes, sir.

Q. And that door opened and you and Lee stepped in?

A. That is right.

It can be seen from the testimony that the appellant, Wong Chin Pung, was the person operating the doors, both the outer and the large barred inner door with the small peek-hole in it; that in fact he was the one who carried on the conversation with Harry Lee when Harry Lee attempted to get through the second door closely followed by Agent Giordano, and that immediately upon

entrance to the place the appellant, Wong Chin Pung, was found beside the door and the other two occupants of the room were far removed from the controls. These doors were locked and there is no dispute between appellant and appellee that there were substantial quantities of smoking opium in the room.

The case of *Eng Jung vs. United States*, 46 F. (2d) 66, quoted by appellant, has no application in this case as the facts are clearly distinguishable.

In the case of *Lee Dip vs. United States*, 92 F. (2d) 802 (9th Circuit, 1937), reversal was asked on the ground that there was no evidence tending to connect the appellant with the narcotics found on Chin Fook and on the further ground that the admission of such testimony and of the articles tended to show the commission of crimes other than that for which the appellant was on trial. It was held that the fact that no narcotics were found on the person of the appellant or in his immediate possession, would not defeat a conviction on a charge of felonious concealment of smoking opium.

In the case of *Jindra vs. United States*, 69 F. (2d) 429, the appellant merely informed the witness that he could put him in touch with some narcotics which a woman had for sale and gave the witness a list of certain of these narcotic drugs and he also gave the witness a card with

his name on it and the name and address of the woman. He called the woman by telephone. This testimony was held sufficient to sustain the charge under the same section of law under which the present case was prosecuted.

CONCLUSION

We respectfully submit to the Court that there is competent and substantial evidence fairly tending to sustain the verdict of guilty of assisting in concealing smoking opium in that the appellant had not only been smoking opium behind barred doors but was also the person who was operating the doors in such manner as to assist in the concealment of the smoking opium and, therefore, believe that Judge McColloch's finding should be sustained.

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